

Served: April 22, 1992

NTSB Order No. EA-3539

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 9th day of April, 1992

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BARRY LAMBERT ~~HARRIS~~  
Acting Administrator,  
Federal Aviation  
Administration,

Complainant,

v.

HENRY J. ELLIOTT,

Respondent.

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Docket SE-9296

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing on August 8, 1989.<sup>1</sup> The law judge affirmed an order of the Administrator charging respondent with a violation of section 91.88(c) of the Federal-Aviation Regulations ("FAR," 14 C.F.R. Part 91)<sup>2</sup> and

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

<sup>2</sup>FAR section 91.88 states:

( continued. . . )

imposing a 30-day suspension of respondent's commercial pilot certificate for allegedly operating an aircraft within the Anchorage Airport Radar Service Area (ARSA) without establishing two-way radio communication with air traffic control (ATC).

Respondent contends on appeal that the law judge erred in affirming the order because the Administrator did not prove that respondent was the pilot-in-command of the aircraft or that the aircraft flew into controlled airspace. He also maintains that he was deprived of an opportunity to cross-examine the only eyewitness to the alleged incident. Lastly, respondent asserts that the law judge improperly arrived at conclusions that were not supported by evidence introduced at the hearings.<sup>3</sup>

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<sup>2</sup>(... continued )  
 "§ 91.88 Airport radar service areas.

(c) Arrivals and overflights. No person may operate an aircraft in an airport radar service area unless two-way radio communication is established with the ATC facility having jurisdiction over the airport radar service area prior to entering that area and is thereafter maintained with the ATC facility having jurisdiction over the airport radar service area while within that area."

<sup>3</sup>Respondent also advances the meritless argument that he did not receive a fair hearing "because of the inability of the Administrative Law Judge to see any of the initials [on a photocopy of a log book page] that were testified to by the witnesses. His physical limitation certainly prejudiced the Airman." Respondent's brief at 8.

The evidence respondent is referring to consists of photocopied pages of the N13GA log book. The initials recorded for the flights of July 4, 1987, are obscured and cannot be read. This does not represent a "physical limitation" of the law judge, but rather is the result of a physical defect in the

( continued. . . )

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order in its entirety.

At approximately 9 a.m. on July 4, 1987, an unidentified aircraft was spotted on radar northwest of the Anchorage Airport, moving eastward, by a controller at the Anchorage, Alaska Air Traffic Control Tower. The controller was not in radio contact with this aircraft, but was communicating with Alaska 88, another aircraft in close proximity to the unidentified aircraft. The controller unsuccessfully attempted to establish radio communication with the unknown aircraft. Eventually, Alaska 88 had to maneuver around the aircraft and was given new vectors. When asked by ATC, the pilot of Alaska 88 relayed that the unidentified aircraft appeared to be a de Havilland Beaver and that it was traveling at approximately 2,500 feet. By contacting other nearby airports and communicating the information he had about the unidentified aircraft, the controller ascertained that it was a de Havilland Otter, N13GA.

The FAA's subsequent investigation into the incident disclosed that the airplane was registered to the owner of Bush Pilots Air Service (Bush Pilots), where respondent was

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<sup>3</sup> (. ..continued)  
quality of the photocopy. The witnesses apparently testified to the initials they read when they saw the original document or a clearer photocopy, not 'the photocopy admitted into evidence at the hearing.

Chief Pilot. When an FAA inspector discussed the incident with respondent in August 1987, respondent stated that he had been flying N13GA on July 4, 1987, in the vicinity of Lake Hood, Alaska. He related the course of the flight, that his wife and daughter were on board at the time, and that he had not realized he had strayed into an area requiring communications with the ARSA'S ATC facility. When asked why he had not contacted ATC, respondent replied that he chose not to because he did not want to be "vectored around into clouds."

At an informal conference in May 1988, respondent repudiated his initial version of the facts, stating instead that he had been confused when first interviewed and upon reflection, realized that he had not flown at all on July 4, 1987, and had not flown the single-engine otter as pilot-in-command at any time. He produced the log book of N13GA and indicated that the initials entered for July 4, 1987, were not his. Respondent stated that he had been at a Fourth-of-July party at the time of the alleged incident.<sup>4</sup>

In the course of his investigation, the FAA inspector spoke with the owner of Bush Pilots, who revealed that all of the company's log books had been, mistakenly removed from his office, possibly during an audit, and had never been located.

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<sup>4</sup>Respondent gave the names of witnesses who he claimed could verify that he was at a party on July 4, 1987. The FAA inspector testified that he interviewed four or five of the "witnesses," none of whom could verify that respondent was at the party.

He was surprised to learn that the inspector had copies of the log book for N13GA's flight of July 4, 1987.<sup>5</sup> When asked, the owner could not identify the initials in the book for that date, but knew that they were not his own.<sup>6</sup>

In September 1988, respondent participated in another informal conference with FAA officials. This time, respondent stated that the owner of Bush Pilots had been the pilot-in-command of N13GA on July 4, 1987, and had ordered respondent to "take the rap" for him with the FAA. At the hearing, respondent testified that after he left the employ of Bush Pilots, he decided that he was no longer willing to cover up for his former boss.<sup>7</sup> He further stated that he had never flown solo in N13GA, and several witnesses testified that they had never seen respondent operate N13GA.

In his appeal, respondent asserts that the law judge erred in upholding the Administrator's order because the Administrator did not meet the requisite burden of proof. We disagree. The preponderance of evidence introduced at the hearing sufficiently supports the law judge's finding that

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<sup>5</sup>The owner testified at the hearing that the other missing documents had still never been found.

<sup>6</sup>While this appeal was pending, respondent submitted to the Board a supplementary statement by the owner attempting to clarify his testimony. The Administrator then filed a motion to strike, to which no reply was made. We will grant the Administrator's motion.

<sup>7</sup>Curiously enough, no one at the hearing asked the Bush Pilots' owner whether he had, in fact, directed respondent to "take the rap" for him with the FAA.

respondent did, in fact, operate the aircraft N13GA in the incident at issue. The law judge, after reviewing the evidence and listening to the testimony firsthand, made a credibility determination? believing respondent's first version of the events, as related to the FAA inspector.<sup>8</sup> Respondent's admission sufficiently established pilot identity. See Administrator v. Ter Keurst, NTSB Order No. EA-3460 at 5 (1991). Absent "arbitrariness, capriciousness or other compelling reasons" we will not disturb a law judge's credibility determination. Administrator v. Pullaro, NTSB Order No. EA-3495 at 3 (1992), and cases cited therein. See also Administrator v. Miller, NTSB Order No. EA-3455 at 6 (1991).

Respondent further alleges that the law judge based part of his decision on the law judge's own unsubstantiated speculation that Bush Pilots' owner would not have asked respondent, as General Manager and Chief Pilot, to "take the rap" for him because this would have put the owner's personal and financial interests in greater jeopardy than they would have been had the owner himself been cited for the violation. This argument must fail. The law judge heard testimony,

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<sup>8</sup>See Administrator v. Richards, 2 NTSB 1160 (1974), where we stated: "Faced with . . . directly conflicting testimony . . . the law judge had no choice, and indeed it was his duty, to make an assessment of credibility and the associated findings of fact. Therefore, it was not error, as argued by respondent, but rather unavoidable that the law judge's decision rested to a considerable extent on credibility." Id. at 1161.

observed the demeanor of the witnesses, and evaluated the evidence before deciding whose version of the facts to believe. As discussed above, he is authorized to make the necessary credibility determinations. The law judge did not base his decision on inherently incredible evidence, but rather formed his opinion from a preponderance of the reliable, probative and substantial evidence. See Administrator v. Walters, 3 NTSB 120, 122 (1977), aff'd sub nom. Walters v. McLucas, 597 F.2d 1230 (9th Cir. 1979).

We find unpersuasive respondent's argument that he was deprived of the opportunity to cross-examine the Alaska 88 pilot because the Administrator failed to call the pilot as a witness despite initially expressing the intention to do so.<sup>9</sup> The controller testified to his conversation with the

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<sup>9</sup>Respondent claims that the transcript of the Alaska 88 pilot's conversation with ATC and the testimony of the controller were insufficient to show that respondent's aircraft had been flying at 2,500 feet. ('The controller testified that the altitude limits requiring radio communication with ATC at the point where N13GA was observed on radar were between 1,400 and 4,100 feet.) This was not the only evidence, however, that respondent's aircraft was within the area of mandatory communications with ATC. The FAA inspector testified that at their initial meeting, respondent confirmed that he had flown the Otter on July 4, 1987, on a pleasure flight under visual flight rules in the vicinity of Lake Hood and had not realized that he strayed so far south into the Anchorage ARSA. At that meeting, respondent further recounted that there had been a morning fog layer at about 1,500 feet but he had seen Lake Hood below the scattered to broken clouds. He looked for an opening in the clouds to descend, and eventually landed at Lake Hood. Thus by his own admission, respondent was flying above 1,500 feet. His statement, combined with the testimony of the air traffic controller and the transcript of the controller's communication with the Alaska 88 pilot are compelling evidence that respondent failed to communicate with ATC in an area where he was required to do so.

Alaska 88 pilot and a transcript. of this conversation was introduced into evidence. Board. precedent on the use of hearsay is clear: Hearsay evidence is proper in an administrative hearing, "subject, to the law judge's evaluation of the weight to be given such evidence."

Administrator v. Holmes, 5 NTSB 1128, 1130 (1986). Whether the Administrator chose to call the Alaska 88 pilot as a witness is irrelevant, since respondent was free to call the pilot himself or could have requested a continuance if he felt that the absence of this witness prejudiced his case.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days after service of this order.<sup>10</sup>

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>10</sup>For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).